IN THE

Supreme Court of the United States

October Term, 1973

OCT 20 1973

No. 73-178

BOARD OF EDUCATION OF THE CITY OF CHATTANOOGA, TENNESSEE, *et al.*

vs.

JAMES JONATHAN MAPP, *et al.*

No. 73-188

BOARD OF COMMISSIONERS OF THE CITY OF CHATTANOOGA, TENNESSEE, *et al.*

vs.

JAMES JONATHAN MAPP, *et al.*

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit, sitting *en banc*, is now reported at 477 F.2d 851.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Must a district court make a finding of "bad faith" before it may require a school board which operated a dual school system to desegregate its schools by using the techniques approved by this Court in *Swann*?

2. May a federal district court properly enjoin city officials from respecting a state court injunction order which seeks to prohibit pupil transportation for desegregation pursuant to an unconstitutional state statute?

Statement

These petitions for certiorari are filed by the Board of Education of Chattanooga, Tennessee and its funding agency, the City Commission of Chattanooga. They seek to review a judgment of the United States Court of Appeals for the Sixth Circuit, which disposed of separate appeals taken by the parties from district court orders of August 5, 1971 and February 4, 1972.[1]

[1] The 1971 district court order in this school desegregation action approved a school board desegregation plan for elementary and junior high schools (reserving for later consideration the matter of high school integregation), provided for implementation of the plan as soon as the school board could acquire and operate the vehicles necessary for the pupil transportation contemplated by the plan, but did not establish a deadline for the completion of these processes. The 1972 district court order enjoined the school board, the City Commission, and its members (all added defendants), from attempting to enforce a state court injunction running against the City and purporting to prohibit the expenditure of public funds to provide the pupil transportation required by the desegregation plan.

The Statements of the Case contained in the petitions fail to adequately describe the circumstances confronting the district court prior to entry of its August 5, 1971 order. Considerably greater detail concerning the background of this case, and the degree to which the Chattanooga public schools remained segregated at the time the district court acted, may be found in the opinion of Judge Edwards dissenting from the original panel decision in this cause. The panel decision was subsequently vacated by a grant of rehearing *en banc*.[2]

The history of this litigation may be summarized briefly as follows: This action was commenced on April 6, 1960 seeking to desegregate the Chattanooga public schools. Following considerable litigation over the years, a motion for further relief was filed by the plaintiffs on December 31, 1968; and on November 14, 1969 plaintiffs filed a motion for immediate relief, relying upon this Court's decision in *Alexander* v. *Holmes County Board of Educ.*, 396 U.S. 19 (1969). Hearings were ultimately held in April and May of 1971, at the conclusion of which the district court ruled orally that further desegregation was constitutionally required. It directed submission of a plan by the school board.

The district court summarized the salient facts as follows:

> Coming back to the facts in this case, the facts in this case are largely undisputed. With regard to the matter of student desegregation in the various schools, the facts are set forth quite clearly in various exhibits in the record. They are certainly set forth in Exhibit No. 3, and I might just point out what those

[2] Judge Edwards' opinion is reprinted at pp. 42-72 of the Petition in No. 73-188.

facts indicate. For example, in the year 1970-71, there were no white students at Howard High. It was a totally segregated school. There was one in Riverside High. There were no white students in Orchard Knob. It was totally segregated in Donaldson. There was total segregation in Henry. There was total segregation in Trotter. In all of the former Negro schools there was a total of only 48 white students as compared with 9,223 black students.

The record in regard to white schools is somewhat better than that, but even with reference to white schools there are schools with either no black students in them or one black student as, for example, was the case at East Lake, or as, for example, at Barger where there were two black students. The sum total of the situation is that in the former black schools, there were 9,223 black students and 48 white students. In the former white schools, there were 3,446 black students and 13,250 white students. Those statistics speak for themselves.

With regard to faculty desegregation, these matters are also set forth clearly in numerous exhibits. They are set forth in Defendants' Exhibit No. 70. Without taking up each school in the system, it is sufficient to say that in every instance, save possibly one, where the school was formerly a black school it still has a predominance of black staff and teachers, quite a heavy predominance. For example, 343 black teachers as compared to 74 white teachers in former black schools. In the former white schools, the record is somewhat better. Progress has been made, but there, too, the record indicates that out of a total of 636 white teachers, 562 of them teach in white schools or former white schools. Out of 487 black teachers, 343 of them teach in former black schools and only 144 of them teach in

former white schools. These, as I say, are matters that are undisputed in the record.

Well, it is of course obvious and apparent, and has been quite frankly admitted by counsel for the defense in his argument, that the Chattanooga School System does not comply with the law as that law stands at the present time and as that law has been enunciated by both the United States Supreme Court and the Court of Appeals for this Circuit. It does not comply with respect to either of the five issues that were defined as being at issue in this case.

Accordingly, the School Board is going to be required to submit a plan for the desegregation of the Chattanooga schools, including the matter of rezoning those schools, bearing in mind all of the various means available as they have been defined in various cases, including *Swann*, and other means that may occur to the School Board for accomplishing the purposes which they have been mandated to accomplish.[3]

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[3] Judge Edwards further elaborated upon the segregation remaining in Chattanooga by quoting two paragraphs from the district court's subsequent July 26, 1971 opinion:

Elementary Schools

During the school year 1970-71, the Chattanooga School System operated 33 elementary schools. Of the ten former black elementary schools within the system, four remained all black and a total of only 30 white students attended the other six. In the 23 former white elementary schools there were 13,250 white children and 3,446 black children. Four former white elementary schools (Cedar Hill, Normal Park, Pineville, and Rivermont) remained all white. Barger had only two black students and East Lake had only three black students. Two former white elementary schools (Avondale and Glenwood) had changed to all black schools, having only three white students between them. The remainder of the former white elementary schools had ratios of black students varying from a low of 4% to a high of 64%. . . .

The school board filed its desegregation plan (plaintiffs had previously presented an alternative plan at the April hearings) and hearings were held. On July 26, 1971, the district court issued a memorandum opinion adopting the board's elementary and junior high school plan and reserving judgment upon an appropriate high school desegregation plan. On August 5, 1971, the court entered an order in accordance with its opinion.[4] The school board and the plaintiffs cross-appealed.

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[3] (*continued*)

Junior High Schools

During the school year 1970-71, the Chattanooga School System operated 12 junior high schools. Of the four formerly black junior high schools within the system, two remained all black and a total of only 9 white students attended the other two. In the eight formerly white junior high schools, there were 3,341 white students and 908 black students. One formerly white junior high school (East Lake) had only one black student. The remainder of the formerly white junior high schools had ratios of black students varying from a low of 8% to a high of 70%. . . . (329 F. Supp. 1374, 1381, 1383; Petition in No. 73-188, pp. 51-52)

[4] The court directed implementation of the board's plan with the following proviso:

4. All provisions of said amended plan of desegregation filed by defendants will be implemented in time for the commencement of the 1971-72 school term; provided however, that in implementing any portion of said amended plan regarding student assignments in the elementary and junior high schools as is dependent upon acquiring, staffing, and scheduling transportation facilities not now available to the schools, the defendants shall implement such portions of said plan as may be feasible with the transportation facilities reasonably available to it at the commencement of the September term of school, and may delay the implementation of any remaining portions of said student assignment plans in the elementary and/or junior high schools until the transportation facilities necessary therefor can be acquired in the prompt but orderly process of school administration and of local governmental affairs, and until such facilities can be placed in use with safety and with a minimum interruption to the educational program. As soon as the defendants can formalize their plans

In accordance with the order, certain portions (described by the school board as its "operational" plan) of the elementary and junior high school proposals were implemented during the 1971-72 school year. This partial implementation did not include any pupil transportation from noncontiguous zones and resulted, in a school system which was then 57% black, in the attendance of 69% of all black elementary students, 63% of all black junior high school students, and 55% of all black senior high school students, in virtually all-black schools.

As the 1972-73 school year approached, the board began making preparations to implement the remaining portions of its elementary and junior high school plan, and to acquire and operate the necessary pupil transportation facilities. Coincident with this planning, a state court action was brought by individual residents of Chattanooga against the City Commission. Pursuant to a recently enacted Tennessee statute (see Petition in No. 73-188 at pp. 59-60), nearly identical with that held unconstitutional in *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971), these residents sought to restrain the City from making funds available to the school board for the purpose of transporting children "for racial balance."

On January 18, 1972, the state court issued a permanent injunction barring the use of city funds to transport students "from one school to another or from one school district established for his neighborhood to another." That injunction, if valid, would reach even the few contiguous pairings which had already been implemented by the school board.

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in this regard, and in no event later than within thirty days, the defendants will advise the Court of their proposed implementation schedule in accordance with the foregoing, furnishing copy thereof to counsel for the plaintiffs.

Although the City of Chattanooga purportedly took the position in state court that the Tennessee statute conflicted with the Fourteenth Amendment,[5] it announced that it would not appeal, and it notified the school board that it viewed the injunction as a valid order which the city would obey. In turn, the Chattanooga School Board brought these events to the attention of the federal court and petitioned for further instructions. On January 25, 1972, the district court directed the plaintiffs to file supplemental pleadings and add the state court proceeding parties as defendants in this cause; a petition for temporary restraining order and injunctive relief, and to add parties,[6] was filed January 26, 1972 and a show cause order issued that day.

Following a hearing, the district court permanently enjoined the added defendants from attempting to enforce the state court order.[7] The court also amended its August 5, 1971 decree so as to require complete implementation of the elementary and junior high school plan not later than the commencement of the 1972-73 school year.[8] The

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[5] *North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43 (1971); *Lee* v. *Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970), *aff'd* 402 U.S. 935 (1971).

[6] Added as defendants were the City of Chattanooga, its Mayor, City Commissioners, and City Auditor; the plaintiffs in the state court litigation, and their attorneys.

[7] The district court's opinion of February 4 is reported at 341 F. Supp. 193. Its accompanying order is reprinted in the Petition for Certiorari in No. 73-188 at pp. 25-27.

[8] On August 11, 1972, the district court stayed its orders insofar as they "necessarily involve[d] the transportation of elementary and junior high school students" pending appeal pursuant to its interpretation of §803 of the Education Amendments of 1972. Compare *Drummond* v. *Acree*, 409 U.S. 1228 (1972); *Board of Educ. of Memphis* v. *Northcross*, 409 U.S. 909 (1972). Plaintiffs immediately appealed that order and sought summary reversal

school board and City Commissioners appealed from this order.

REASONS FOR DENYING THE WRITS

I.

The School Board Raises No Issues of Substance Which Merit Consideration by This Court.

The Chattanooga School Board's complex set of "issues presented" and its elaborately structured argument (No. 73-178) reduce themselves to contentions long since rejected by this Court. Despite the undisputed statistical showing of segregation remaining in the Chattanooga schools in 1970-71 (see pp. 3-6 *supra*), this school board strenuously resisted taking adequate remedial measures. The fundamental notion which underlies its argument is that a district court may not require affirmative, race-conscious action to effectively desegregate a school system unless the school board is "in default," which term is then defined to mean only that a school board has not violated past court orders, without reference to whether its schools are actually desegregated.

This is nothing but "good faith" revisited. This Court rejected "good faith" as an excuse for failing to desegregate in *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968), and approved even "awkward" or "bizarre" measures if necessary in order to desegregate, in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). The Chattanooga board, however, attempts to support its position by a deliberate misconstruction of the

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and vacation of the stay; however, the Court of Appeals has never acted upon plaintiffs' motions. Thus, as of the date of the Court of Appeals' *en banc* decision in the spring of 1973, the district court's August 5, 1971 decree had never been fully implemented.

"default" language in *Swann*. There, the Charlotte school board's refusal to submit an adequate desegregation plan was a "default" justifying the district court's appointment of its own expert to prepare one. But the basic *Brown II* primary obligation of a school board to desegregate does not depend upon such a "default" or "bad faith." Compare Petition in No. 73-178, pp. 8-14. *Swann* was properly in federal court because the Charlotte schools were still segregated.

Chattanooga's suggestion that no constitutional violation was ever shown in this case (Petition in No. 73-178, at p. 5) is ludicrous on this record, which thoroughly supports the action of the district court in requiring real and meaningful desegregation. The August 5, 1971 decree was premised upon more than the compelling statistical showing referred to above. At the hearings, the board's own witnesses acknowledged the continuing substantial segregation of the Chattanooga public schools, both as to students (Tr. 277, 717, 774, 862)[9] and as to faculty (Tr. 717, 861). At the high school level, Chattanooga in 1970-71 still used "freedom of choice" assignments, which the board's own personnel testified did not bring about desegregation (Tr. 773 [Assistant Superintendent]; Tr. 878 [Superintendent of Schools]). At the elementary and junior high school level, extensive testimony and evidence revealed that the then applicable zone lines for the vast majority of public schools were remarkably similar to the pre-litigation dual overlapping zone lines (Ex. 1, 2, 4, 19; Tr. 412). The Superintendent of Schools admitted that segregation in the system as a whole had not been eliminated since 1962 (Tr. 862) because the single

[9] Citations are to the transcript of the 1971 hearings. Exhibit references also refer to documentary and demonstrative evidence introduced at these hearings.

boundaries substituted for the dual overlapping zone lines maintained segregation (Tr. 877). The evidence also reviewed the school system's creation, after 1962, of optional attendance areas in the lower grades which made it possible for students to avoid attending desegregated facilities (Tr. 312-15).

There is little or no dispute among the parties about these factual matters. The school board's only defense is that since it arguably had not directly violated court orders between 1962 and 1970 when it failed to affirmatively redraw zone lines and take other steps to achieve desegregation, the court could not require it to adopt effective integration measures now.

This case, then, is a classic post-*Green* school desegregation action in which a school board which has never effectively desegregated its schools still seeks to avoid taking the necessary steps to achieve the constitutionally required result. Review by this Court, as proposed by the Chattanooga board, would present no novel matters which were not considered and resolved in *Swann, supra.* That decision was correctly applied by the Court of Appeals in affirming the judgment of the district court on the school board's appeal.

II.

The Issue Sought to Be Presented by the City of Chattanooga Is Not Developed on This Record.

The City of Chattanooga (Petitioner in No. 73-188) seeks review of issues which are simply not presented on this record. Notwithstanding their contrary contentions, neither the City of Chattanooga nor its commissioners, mayor or city auditor, have to date been placed under any order by the district court in this case "to appropriate funds to pay for the purchase, maintenance and operation of a

school bus system to promote a board of education's desegregation plan" (Petition, p. 2). While that result is conceivable under certain circumstances in the future, the plain fact is that it has not yet come to pass. Therefore, this case presents no opportunity for this Court to rule upon issues related to this hypothetical event.

As noted in the Statement, above, the city and its officers were joined because they were defendants in a state court proceeding which was determined by the district court to violate *North Carolina State Bd. of Educ.* v. *Swann, supra.* The *only* relief which has ever been ordered against the city defendants restrains them "from in any manner seeking enforcement of or in any manner complying with" the state court ruling (Petition at p. 26).[10] And while the city defendants sought reconsideration of the district court's injunctive order so as to obtain the district court's opinion about other matters,[11] the court acted well within its discretion in declining, in the absence of appropriate pleadings, to enlarge the scope of its consideration beyond "the validity or invalidity of the state court order, the matter passed upon in the order of this Court entered February 4, 1972." [12]

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[10] The modification of the district court's previous order (see Petition in No. 73-188 at p. 26) related to provisions of the order binding only upon the school board defendants. See note 4 *supra.*

[11] The city's Motion for a New Trial or Rehearing stated in part:

> . . . move the Court for a new trial or rehearing *limited* to the following legal issues which should be resolved at this stage of the proceedings so that the defendant Board of Commissioners will know . . . : (a) Does the defendant Board of Commissioners . . . have the *legislative discretion* to decide *whether* or not to make appropriations . . . . [emphasis in original]

[12] The district court's order of February 25, 1972 denying rehearing was not reprinted by Petitioners but may be found *infra,* pp. 1a-2a.

The city defendants on several occasions have expressed their concern about the scope of their discretion to determine the annual appropriation of funds to the public school system. However, even after their joinder as additional defendants in this cause for the limited purpose of restraining compliance with the state court ruling, the city defendants made no attempt to obtain a declaration of their rights by appropriate pleadings or otherwise to present these claims in the orderly course of the litigation.

Under the circumstances, none of the issues described in the Petition of the city defendants are ripe for this Court's review. At some point in the future, the city commission may attempt to reduce the school board's budget by an amount equal to the cost of pupil transportation for desegregation, or otherwise attempt to directly interfere with the execution of a district court order. That will be sufficient time to consider the legal principles involved, in the context of an actual controversy.

Finally, there can be little doubt that a district court may protect its jurisdiction and enforce its orders against direct or indirect attack without reopening the question whether the Fourteenth Amendment was ever violated in Chattanooga. *Cf. Griffin* v. *County School Bd. of Prince Edward County*, 377 U.S. 218 (1964). A decision upon that issue in this case would also be measurably affected by the fact that the City Attorney acted as co-counsel for the school board from the inception of this lawsuit until he withdrew from such representation while the matter was on appeal below.[13]

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[13] Petitioners also make passing reference to last Term's ruling in *City of Kenosha* v. *Bruno*, 37 L.Ed.2d 109 (1973). This Court was careful to note therein that only the municipality was named as a defendant, but if the district court's ruling in this case was in error insofar as it ran against the city itself, the matter can be easily rectified since the individual city officers were also made parties defendant subject to the order.

CONCLUSION

For the foregoing reasons, the writs of certiorari should be denied.

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